SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 556 9

DONALD R. DOREMUS AND ANNA E. KLEIN,
Appellants,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE AND THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OF APPELLEES MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION, INCLUDING APPELLEES' MOTION TO DISMISS OR AFFIRM THE APPEAL

The appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal on the ground of lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey

on the ground that the questions raised by the appellants are so unsubstantial as not to need further argument.

This cause appears to be reviewable by the Supreme Court on direct appeal from the Supreme Court of New Jersey. Appellees assert, however, that jurisdiction is lacking under the statute and in addition the unsubstantial character of the grounds stated by appellants are so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The appellants, Donald R. Doremus and Anna E. Klein, served on appellees, Board of Education of the Borough of Hawthorne and the State of New Jersey on April 27th, 1949, a summons and complaint in the nature of a complaint for a declaratory judgment declaring that New Jersey Revised Statutes 18:14-77 and 18:14-78 are unconstitutional as being in violation of the First and the Fourteenth Amendments of the United States Constitution. Revised Statute 18:14-77 provides:

> "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

> "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First and Fourteenth Amendments to the United States Constitution provide in part:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellees duly filed their answers denying that appellants had a substantial interest in the matter and further denying the unconstitutionality of the statutes in question. The matter came on for hearing in the New Jersey Superior Court Law Division, Passaic County, upon cross-motions by appellants and appellees for summary judgment on the pleadings. After argument and consideration of the applicable law, the Court granted the appellees' motion for summary judgment on the pleadings and held the statutes to be constitutional and not in contravention of the cited provisions of the United States Constitution.

The appellants duly filed their notices of appeal to the Appellate Division of the New Jersey Superior Court, and appellee, State of New Jersey, filed its application for certification of the Law Division's decision directly to the New Jersey Supreme Court. Said application for certification of the entire matter was granted and the cause was duly argued at the September 1950 term of the New Jersey Supreme Court.

On October 16, 1950, the New Jersey Supreme Court upheld the decision of the Superior Court, Law Division, and concluded that the statutes under attack were valid.

The appellants on January 16, 1951, served an order allowing the appeal to this Court, together with supporting papers, upon the appellees, State of New Jersey and the Board of Education of the Borough of Hawthorne.

MATTERS AND GROUNDS MAKING AGAINST JURISDICTION

I

Appellants Sue as Citizens and Taxpayers and One of Them Sues as Parent of a Minor Child. They Have Not Shown Sufficient Injury To Raise a Substantial Federal Question.

The complaint is one for declaratory judgment, and appellants are without legal standing to press such a claim.

The law is well settled that in a proceeding for a declaratory judgment the jurisdiction of the Courts may not be invoked in the absence of an actual controversy. Not only must the appellants prove their tangible interest in obtaining a judgment but the action must be one adverse in character. That is, there must be a controversy between the plaintiff and the defendant having an interest in opposing a claim, subject to the Court's jurisdiction.

The New Jersey Supreme Court in its opinion below recognized this principle and stated that there was substance to appellees' argument. (Appellants Statement as to Jurisdiction Appendix A, page 10.)

The complaint in paragraphs 1 and 2 states that the interest of the plaintiffs is as citizens and taxpayers of the State of New Jersey.

With respect to the suit by plaintiffs as citizens it is clearly and unequivocally stated in Vol. 12 of Corpus Juris, "Constitutional Law," page 761, Section 179, that a mere citizen having no interest in the validity of a law beyond that of other citizens and not professing to sue on behalf

of others may not raise the question of the constitutionality of a statute. With reference to the plaintiffs' (appellants') status as taxpayers, a taxpayer may not question the constitutionality of a statute which does not affect him. In the case at Bar the appellants have alleged their status as citizens and taxpayers which is admitted by appellees. The appellants, however, have failed to show that as citizens they have been injured, that as taxpayers they have been injured or that as citizens and taxpayers they have been injured. They merely admit a certain state of facts which admission is concurred in by the appellees, but they fail to prove that predicated upon these facts they have suffered any injury, or been deprived of any liberty or property right by virtue of the compliance with the statutes under examination. The appellants claim that their consciences are being violated by the forced exaction of taxes for the support of religion to which they conscientiously object. No specific tax is referred to but rather an unmeasured use of tax funds. Nor is there a showing that such use impairs the ability of appellants to practice their conscientious beliefs. Whether they object as believers or non-believers and to what extent and in what manner they have suffered injury is not revealed or proved.

In the case of *Frothingham* v. *Mellon*, 262 U. S. 447 (U.S. Sup., 1923), a Mrs. Frothingham sued in the District Court of the District of Columbia to enjoin the Secretary of the Treasury and other Federal officials from enforcing the Maternity Act of 1921 on the ground that it was unconstitutional and hence that as a taxpayer of the United States the plaintiff by its enforcement would be deprived of her property without due process of law. Her bill was dismissed in the District Court and both the Court of Appeals and the Supreme Court of the United States affirmed.

The Frothingham case was used as the basis of the decision in *Elliott* v. *White*, 23 Fed. (2d) 997 (Ct. App., D.C.

1928), in which case the Court dismissed a bill against the Treasurer of the United States to prevent the payment of salaries to Chaplains of the Senate, House of Representatives, Army and Navy. The plaintiff contended that the employment of such chaplains constituted a religious establishment in violation of the First Amendment. In the latter case, the plaintiff sued in the capacity of a citizen rather than that of a taxpayer but it was nevertheless held that merely being a citizen or being a taxpayer without injury or damage particularly shown, was not sufficient cause to sustain an action.

Predicated upon this theory of law which is undeniably correct, it is obvious that Donald R. Doremus, one of the appellants to the cause before the Bar, has individually failed to prove either his injury as a citizen or his injury as a taxpayer. Donald R. Doremus is admittedly a citizen and a taxpayer but he has conclusively failed to set forth what his interest is or what injury he has suffered to warrant this Court entertaining his appeal. Similarly, Anna Klein has likewise failed to show the necessary element of injury or damage either to herself or to her daughter, and has not demonstrated the adverse character of the proceeding.

The basic principle involved was stated by Justice Sutherland in the Supreme Court (Frothingham case, supra) as long ago as 1923. He said:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he

suffers in some indefinite way in common with people generally."

In *Coleman* v. *Miller*, 307 U.S. 433 (U.S. Sup. 1939) Mr. Justice Frankfurter said:

> "No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all."

While these words are from a dissenting opinion, they voice the view of the Court as a whole on this particular point as is shown by the Court's ruling that Coleman had a sufficient interest to entitle him to prosecute the case before it.

In the case of *McCollum* v. *Board of Education*, 333 U.S. 203 (U.S. Sup. 1948) Mr. Justice Jackson expresses doubts as to whether or not the Court should take jurisdiction in a somewhat similar situation. He said:

> "In the *Everson* Case there was a direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we had jurisdiction to examine the constitutionality of the levy and to protect against it if a majority had agreed that the subsidy for transportation was unconstitutional.
>
> "In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury."

Certainly in the case at Bar the injury, if any, to appellants is incalculable and negligible. In the McCollum case there was the element of "released time" for a substantial portion of the school day for admitted sectarian instruction. Not so in the case at Bar where the acts complained of consumed such a minor portion of the school day in non-sectarian activity.

The case at Bar is a perfect example of a situation where the maxim "de minimus non curat lex" should be applied. The law does not bother with trifles; and in view of the above discussion and further in view of the fact that the appellant Klein's daughter has graduated, her injury, if any, is trifling.

II

Acquiescence By the People and Particularly of These Appellants in the Practices Complained of For Such a Long Period of Time Creates a Presumption of Validity, Estops Appellants and Eliminates Any Substantial Federal Question.

Examination of Title 18, Chapter 14, Section 77 (N.J.R.S. 18:14-77), commonly known as "Reading Bible at opening of school," discloses that it had its inception and did first appear upon the law books of the State of New Jersey under Chapter 263 of the Laws of 1916, and read as follows:

> "1. In each public school classroom in the State and in the presence of the scholars therein assembled, at least five verses from that portion of the Holy Bible known as the Old Testament shall be read or caused to be read, without comment, at the opening of such school, upon each and every school day by the teacher in charge thereof; provided that whenever there is a general assemblage of school classes at the opening of such school day, then instead of such classroom reading, the principal or teacher in charge of such assemblage shall read at least five verses from

said portion of the Holy Bible or cause the same to be read in the presence of the assembled scholars as herein directed.

"2. This act shall take effect immediately."

Title 18, Chapter 14, Section 77, of the New Jersey Revised Statutes (N.J.R.S. 18:14-77) is substantially the same as the parent act above set forth. Other than the fact that the subsequent statute has been condensed through a rephrasing of the words used, it speaks and conveys the very same thought and demands the very same duties. The subsequent statute, when incorporated and made a part of the Revised Statutes, was changed solely in phraseology and not in thought or content. Therefore the duty of reading the Bible, without comment, in our public schools, daily, has been a part of our State Laws for approximately 35 years.

Throughout these 35 years, that statute has remained unchallenged. Throughout these 35 years that statute has been faithfully complied with without ever having been questioned in any manner in this State.

R. S. 18:14-78 has been on the books 48 years. It was enacted as Section 114, Chapter 1 (Second Special Session) of the Laws of 1903 and read as follows:

> "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

There is no evidence that by compliance with the statutes, any person's constitutional rights, immunities or liberties have ever been infringed. There is certainly no evidence that the school systems in complying with the statutes, have, through such compliance, established a church or religion, established sectarian instruction, or inculcated a

dogma or creed. The practice and procedure called for by the statutes is the very same today as it was when the parent acts were first incorporated into our laws, 35 years ago and 48 years ago, respectively. There is no indication of expansion of the duties or powers called for under the statutes. The statutes have never been used as a means of infiltrating our educational system with religion or religious practices; they have never been used for purposes of sectarian instruction.

These statutes having been upon our law books for so many years, are presumed to be constitutional. The cases state clearly that a statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. In testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it is susceptible of such interpretation, and the statutes and constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done. If a statute is susceptible of two constructions, one which will render it constitutional and the other of which will render it unconstitutional in whole or in part, or raise grave and doubtful constitutional questions, the Court will adopt that construction which, without doing violence to fair meaning of language, will render it valid, in its entirety, or free it from doubt as to its constitutionality, even though the other construction is equally reasonable, or seems the more obvious, natural and preferable interpretation.

This rule is based on the presumption that the Legislature did not intend to violate the constitution but intended to act within the scope of its lawful powers and to enact a valid and effective statute.

As a consequence of the rule of construction in favor of validity, the Courts will not adopt a strained, doubtful,

restricted, rigid or literal interpretation in order to condemn a statute as unconstitutional. Neither will the Courts sustain an attack on a statute, if there is a reasonable theory on which it may be constitutionally upheld. Where a statute has been in force for a long period of time during which time its construction has been unquestioned, (as in this case) the Court will decline to give it a contrary construction which would render it void, unless compelled to do so by unequivocal language in the act. (Corpus Juris Secundum. Volume 16, Constitutional Law, Section 98, page 234 et seq.)

A contemporaneous, uniform, legislative construction of constitutional provisions adopted and acted on with the acquiescence of the people for many years has always been entitled to great weight. *Okanogan Indians* v. *United States,* 279 U.S. 655, 688 (U.S. Sup. 1929); *Hanover Fire Insurance Co.* v. *Harding,* 327 Ill. 590, 603, 158 N.E. 849 (Ill. Sup. 1927). The New Jersey Supreme Court expounded the applicable law through its Court of Errors and Appeals in the case of *Legg.* v. *Passaic County,* 122 N.J.L. 100, affirmed 123 N.J.L. 263. The Court said:

> "We think it proper to point out that one of the fundamental policies of our jurisprudence is not to declare unconstitutional a statute which has been in force without any substantial challenge for many years, *unless its unconstitutionality is obvious.*"

Appellants, by their actions, have estopped themselves and waived their right to question the constitutionality of the statutes under examination.

A person may by his acts, or omissions to act, waive a right which he might otherwise have under the provisions of a constitution. Thus, a person who has acquiesced in the proceedings under a statute may not question its constitutionality. While it is true that acquiescence in an

unconstitutional statute for many years will not render it valid, it is also true, that the proposition "if an act is invalid when passed the vice continues and the statute may be annulled at any time," does not apply to political or administrative (ministerial) legislation but such laws must be attacked in seasonable time without delay. 12 Corpus Juris, "Constitutional Law," 769, sec. 190. In the case at Bar the statutes under attack are predicated upon the ministerial legislation known as "Title 18 of the New Jersey Revised Statutes" and commonly known as the "Statutes on Education." Being such administrative ligislation, the same is therefore beyond attack at the present time because the essence of the two statutes in question has been upon the law books of the State of New Jersey in substantially the same form for the past 35 years and 48 years respectively.

It is admitted in the facts of the case at Bar that neither the parents nor the daughter has ever asked to be excused while the school authorities were dutifully complying with the statutes under examination, but, on the contrary, the daughter participated and was present at such compliance with the statutes on each and every school day when she was not absent for other reasons. She has now graduated. In fact, and by inference, the injury, damage or harm that allegedly was being done must either have been decidedly minimum and of no consequence, or non-existent because the student through her own acquiescence and that of the parent continued to participate actively in that portion of the school day's work.

III

The Statutes Involved Were Enacted By the State of New Jersey Pursuant To Valid Exercise of the Police Power.

The police power means the general power of a government to preserve and promote the public health, safety, *morals*, comfort or general welfare even at the expense of

private rights. *State* v. *Old Tavern Farm Inc.*, 133 Maine 468, 180 Atl. 473 (Maine Supreme Judicial Court 1935). The police power has, of course, been reserved to the states and not delegated to the Federal government. *Keller* v. *United States*, 213 U.S. 138, 53 L. Ed. 737, 29 Sup. Ct. 470, 16 Ann. Cas. 1066 (U.S. Sup. Ct. 1909); *State* v. *Old Tavern Farm Inc.*, supra.

That the subject matter of this controversy is an appropriate matter for legislation, regulation and control under the police power cannot well be questioned. The State is charged with the general power to promote the *morals* of the public and has seen fit to do so by enactment of the statutes in question.

The case is clearly distinguishable from that of *McCollom* v. *Board of Education*, 333 U.S. 203 (1948) relied on so strongly by appellants in their statement as to jurisdiction. In that case the Legislature of the State of Illinios had not spoken on the matter. Involved was merely an administrative ruling of the local Board of Education. In this case, however, the people of the State of New Jersey through their elected representatives, the public policy-making organization of the State, have seen fit to enact the legislation in question after solemn deliberation. This Court has held that education under the Federal Constitution is a matter of State power and not of Federal power, and is not to be interfered with unless the constitutional rights guaranteed by the Federal Constitution are *clearly* infringed. *Cumming* v. *Richmond County Board of Education*, 175 U.S. 528, 545 (U.S. Sup. 1899); *Gong Lum* v. *Rice*, 275 U.S. 78, 85 (U.S. Sup. 1927).

In *Adamson* v. *California*, 332 U.S. 46, Mr. Justice Reed said at p. 53:

> "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."

The only means of enforcing the First Amendment to the Federal Constitution against the State of New Jersey is by virtue of the Fourteenth Amendment. *W. Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 639.

The preamble of the New Jersey Constitution of 1844 reads as follows:

> "We, the people of the State of New Jersey, grateful to *Almighty God for the civil and religious liberty* which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this constititon:" (Italics ours.)

This preamble has been carried over into the Constitution of 1947.

The Fourteenth Amendment to the United States Constitution was adopted by the requisite number of States and became a part of that constitution in the year 1868. Under the Tenth Amendment to the Federal Constitution all powers not delegated to the United States by the Constitution or prohibited by it to the States are reserved to the States respectively or to the people. When the Fourteenth Amendment was adopted in 1868 the drafters of the Amendment must have contemplated and been aware of the New Jersey Constitution of 1844 and similar State Constitutions then in existence and therefore recognized that the State of New Jersey and the other States were and are in fact composed of religious peoples.

Pursuant to the above notion that the State of New Jersey is composed of religious peoples their elected representatives enacted the legislation in question in the exercise of the police power.

Motion To Dismiss or Affirm

Appellees respectfully submit this statement showing there is no substantial Federal question involved and consequently a lack of jurisdiction.

Wherefore, appellees respectfully move the Court to dismiss the appeal in this cause or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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